SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 53

GEORGE D. KER and DIANE K. KER,

Petitioners,

—v.—

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR PETITIONERS

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Statement of the Case

The Petitioners were charged in an information filed by the District Attorney of the County of Los Angeles, State of California, with the violation of Section 11530 of the Health & Safety Code of the State of California, to wit: possession of marijuana. After pleas of not guilty and at the commencement of trial the Petitioners moved under Section 995 of the Penal Code of the State of California to set aside the information upon the ground that they had been committed without reasonable or probable cause and that the evidence upon which they were committed was obtained by unlawful search and seizure. Evidence was taken on this point, out of the presence of the jury, and the motion was denied. Thereafter the trial was had and the Petitioners were found guilty. The husband, George D. Ker, was sentenced to the State prison and the wife, Diana Ker, was sentenced to the State prison and the wife, Diane period in the County jail.

The record shows as follows:

(1) Police officers (Deputy Sheriffs of the County of Angeles) had received evidence from November, 1959, to May, 1960, from unidentified persons that George Ker was selling marijuana from his home and that he had probably purchased it from one Murphy (R-30).

(2) The officers received information on four or five occasions during the period of May, 1960, to the date of arrest in July, 1960, from one Black of George Ker's activities in marijuana (R-30). This was categorically denied by Black when he took the stand for the defense (R-40).

(3) The officers observed a meeting between Ker and Murphy at a point in the early evening where they had observed a fellow officer make a purchase from Murphy the night before (R-20, 23, 24). They did not know Ker but secured his address from his license plate (R-24). The spot was well lighted, sufficiently so that they could identify Ker in court (R-28). They did not observe anything pass between Murphy and Ker (R-27).

(4) Approximately one hour later that same evening the officers went to the address of Petitioners as revealed by a check with the Department of Motor Vehicles (R-24), ascertained that someone was home, secured a key from the manager of the apartment, opened the door of Petitioners' apartment, quietly and without knocking entered without permission (R-31).

(5) On entering the apartment George Ker was in the front room sitting down. The officers identified themselves and announced they were conducting a narcotics investigation. They similarly identified themselves to the Petitioner, Diane Ker. The officers then looked in the kitchen and ob-

served a "kilo brick" of marijuana on some scales (R-31). The officers then placed the Petitioners under arrest, conducted an additional search and found some loose marijuana (R-32).

(6) The following day officers went back to the apartment and searched a car belonging to Diane Ker and found additional marijuana (R-67).

(7) The officers had neither a search warrant nor a warrant of arrest for Petitioners (R-149).

Summary of the Argument

In view of the decision the case of *Mapp* v. *Ohio*, 357 U.S. 643 (8 S.Ct. 1684, 6 L. Ed. 2d 1081), the Federal rule with respect to the suppression of evidence seized as a result of an illegal search is now applicable to proceedings in State courts. While the States may provide greater protection to the individual with respect to searches and seizures in the absence of a warrant, they cannot afford less protection than that required under the Federal rules.

The Constitution has placed a magistrate between the police officer and the citizen. The practicability of obtaining a search warrant or a warrant for arrest before the search was demonstrated by the evidence, and the lapse of time between the observation of the suspicious behavior was sufficient to have given the officers time to secure a warrant before entering the apartment.

The general rule is that *no* search is valid without a search warrant. The only exception is an incidental search to a valid arrest. In the instant case the search preceded the arrest. This Honorable Court has never sustained as reasonable an incidental search of a home under a warrantless arrest.

ARGUMENT

I.

The Entry into the Petitioners' Apartment and Subsequent Search and Seizure of Evidence Was a Violation of Petitioners' Constitutional Rights Under the 4th and 14th Amendments to the United States Constitution.

A search which is unreasonable for want of probable cause cannot be made reasonable by what the search uncovers. A search, if unreasonable when it starts, does not change character and become reasonable as result of its success. *Byars* v. *U.S.*, 273 U.S. 28; *Di Ré* v. *U.S.*, 331 U.S. 581; *Johnson* v. *U.S.*, 333 U.S. 10; *McDonald* v. *U.S.*, 335 U.S. 451.

If a contrary rule were to apply there would never be an unreasonable search or a violation of Constitutional rights when contraband was discovered. Such a rule would encourage the continuing police violation of Constitutional protections.

The illegal entry into the home of the defendants in this case was from its inception a violation of their Constitutional rights. The testimony of the arresting officer was in effect that after entering he told the defendants that they were conducting a narcotics investigation. He walked to the kitchen where he saw the contraband, questioned them about it, and then made the arrest. This indicates clearly that the arrest was a result of the search rather than the search being incidental to the arrest.

Since the decision in the case of *Mapp* v. *Ohio*, 357 U.S. 43, a more uniform rule with respect to search and seizures has become inevitable. As in all Constitutional problems concerned with law enforcement, conflicting social objec-

tives tend to obscure the issue. As Justice Cardozo stated in *People* v. *Defore*, 242 N.Y. 13, 24, 150 N.E. 585, 589:

> "On one side is the social need that crime shall be repressed. On the other, the social need that law will not be flouted by the insolence of office."

This conflict has led to the condition described by Justice Frankfurter in the case of *Chapman* v. *U.S.*, 365 U.S. 610, 618 (concurring opinion):

> "The course of true law pertaining to search and seizures . . . has not—to put it mildly—run smooth . . . It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these cases . . . It turns crime detection into a game of 'cops and robbers.'"

It is submitted that this court must be the final arbiter of the constitutional question of what is an unreasonable search under the *Mapp* decision where the conduct of state officers is in issue, irrespective of what the highest court of a state may hold. In *Elkins* v. *United States*, 364 U.S. 206, 224 (1960), this court, deciding that evidence unlawfully seized by state officers could not be admitted in a Federal court, stated:

> "In determining whether there has been an unreasonable search and seizure by state officers, a Federal court must make an independent inquiry, whether or not there has been an inquiry by a state court, and irrespective of how any such inquiry may have turned out."

In those cases where a warrantless search has been sustained, that is to say, "searches of other than dwelling places", the practicability of obtaining a search warrant has been considered by this court as a material element

going to the reasonableness of the search. The officers in the instant case had the time to obtain such a warrant. They were not in hot pursuit of a criminal who had committed a felony in their presence and as a matter of fact, sufficient time was taken to identify the owner of the vehicle in which it was alleged that the defendant George Ker was driving and sufficient time was taken for the arresting officer to join the other officer at the apartment building in which the defendants resided. The justification urged by the People that the illegal entry was necessary in order to prevent the destruction of evidence is not supported by evidence and is controverted by the fact that the defendant George Ker was sitting in his living room and the defendant Diane Ker had been sitting in the kitchen drinking coffee prior to the entry and that no attempt had in fact been made to destroy any of the evidence. There is no proof that the U-turn said to have been made by the defendant George Ker was made to escape surveillance and pursuit. If so, his subsequent conduct as testified to by the prosecution's witnesses is incomprehensible.

If the police are permitted to make a warrantless search in every narcotics case on the theory that evidence may be destroyed, the protection afforded by the Fourth and Fourteenth Amendments will be nullified with respect to this class of defendants. If an illegal search is made legal on the theory of preventing the destruction of narcotics evidence it would hold equally with respect to the possible destruction of other kinds of evidence and the protection of the Amendments could be nullified at the whim of any police official on his bare assertion that he had reason to believe that evidence might be destroyed. It was to insure that the citizens would not be at the mercy of such whims that a magistrate was interposed between the police and the People. Recent history, of which this Honorable Court may well take notice, has demonstrated the probable re-

sults of the unbridled use of police power when that power is not controlled by an impartial judiciary.

The question whether probable cause is a sufficient Constitutional substitute for a search warrant has been considered by this Honorable Court with varying results. In some cases the court has held that probable cause to believe that a crime has been committed is enough. *But this rule has been specifically rejected with respect to private dwellings where it has been held that a search warrant is required.*

McDonald v. *U.S.*, 335 U.S. 451; *Johnson* v. *U.S.*, 333 U.S. 10, 13, 14; *Weeks* v. *U.S.*, 232 U.S. 383; *Agnello* v. *U.S.*, 269 U.S. 20, quoted with approval in *Chapman* v. *U.S.*, 365 U.S. 610, 613 (1961):

> "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. *And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.*"

As Mr. Justice Jackson, speaking for the Court, said in *Johnson* v. *U.S.*, 333 U.S. 10, 13-14:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a

> nullity, and leave the people's homes secure only in the discretion of the police officers."

The decision in *Mapp* affords for the first time the opportunity to make uniform the measure of protection to which the citizens of the various states may look for security of their homes from unwarranted searches. The anarchic condition of the law and the disastrous effects which flow from it, of which Mr. Justice Frankfurter spoke in the *Chapman* case, may now be eliminated.

Since the fundamental principle has been established that the Fourth and Fourteenth Amendments deny the police of the several states the opportunity to obtain admissible evidence through illegal search, it is now possible to delimit the area of legality. The Constitution extends the same measure of protection to every citizen and the nature of this protection is not subject to variance by the happenstance of State residence.

If a clear decision is not made by this Honorable Court applying the Federal Rules in the case at bar, police officers will still be uncertain as to the legality of a search and in the face of such uncertainty will continue to make illegal searches on the theory that perhaps they may be sustained.

There should be no distinction between the minimum constitutional protection which a citizen of one state may enjoy as compared with a citizen of another state.

In *Elkins* v. *U.S.*, 364 U.S. 206, 215, this Honorable Court stated:

> "To the victim, it matters not whether his constitutional right has been invaded by a Federal agent or by a State officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis."

Mr. Justice Cardozo in *People* v. *Defore*, 242 N.Y. 13, 22-23, 150 N.E. 585, 588, recognized the incongruity of the unequal standards of admissibility of seized evidence and pointedly suggested that

> "The professed object of the trespasser rather than the official character of the trespasser should test the rights of government. . . ."

It is neither sound reasoning nor good policy in view of the *Mapp* decision to say that evidence unlawfully seized by state officers in violation of the Constitution is inadmissible in a federal proceeding (*Elkins* v. *U.S.*, 364 U.S. 206) but the same evidence may be admissible in a state proceeding if the state courts admit it under their own interpretation of the constitutional question involved.

If citizens of the United States now have an effective constitutional guarantee against unreasonable searches by state officers as well as federal agents there should be an equal application of the rule irrespective of whether they reside in California or Ohio or Washington, D. C.

The citizens of all states should now be entitled as a minimum to the standards set in *Agnello* v. *U.S.*, 269 U.S. 20, *Trupiano* v. *U.S.*, 334 U.S. 699, and *Weeks* v. *U.S.*, 232 U.S. 383.

It cannot be held that the decisions of this Honorable Court repeatedly holding that a warrantless search of a dwelling place is illegal and evidence obtained as result of such a search inadmissible represent needless limitations, refinements or distinction such as were discussed by the California Supreme Court in *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, 915.

Indeed in *McDonald* v. *U.S.*, 335 U.S. 451, beginning at page 455 the Court said:

"We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted."

II.

The Search Cannot Be Validated as a Search Incident to a Lawful Arrest nor the Arrest Validated as One Made Upon Probable Cause.

The probable cause relied upon by the prosecution to justify the illegal entry into the defendants' home may be summarized as follows:

(1) Periodically over a period of six months from November, 1959 to May, 1960, he had received information from informants that the defendant Douglas Ker was selling marijuana from his home and that he was securing it from Murphy. (Note that so far as the record is concerned the reliability of these informants is unknown.)

(2) For the two months immediately preceding the arrest, the officer had been told by one Black, on four or five occasions, of Defendant Ker's activities and that he believed in the reliability of Black (R-31). The giving of this information was controverted and denied by Black (R-40), and furthermore, the officer did not know how recently the information from Black had been received (R-34).

(3) He had received information from other officers that they saw defendant on the night of the arrest in his car at a point where an officer had made a "buy" the previous night; that the officers did not recognize Ker and did not know him; that the officers had secured his identity from a DMV check; that the officers observed Murphy come to Ker's car and have a conversation with him which they did not overhear; THAT THEY OBSERVED NOTHING PASS BETWEEN MURPHY AND KER (R-27).

There is nothing in the record to show that the officers had any information at the time of the illegal entry that contraband could be expected to be found in the Ker apartment. The officers had no information that the Kers were committing a felony nor had they anything presented to their senses that the defendants were committing a public offense. Therefore, no reasonable cause existed for an arrest of the Kers. The fact is that the officers came not to arrest, but to search without a warrant. The record clearly indicates that the arrest occurred after the arresting officers had walked toward the kitchen and observed the marijuana on the scales. The record indicates the following:

The testimony of the arresting officer was as follows (R-61):

> Q. Now, could you tell us exactly in sequence and detail what happened when you and Sergeant Wasthen entered that apartment?
>
> A. We entered the apartment; I observed the defendant, George Ker, to be seated on the couch in the living room. As we entered he stood up and faced us. I displayed my identification, stated, "We are Sheriff's Narcotics Officers, conducting a narcotics investigation." Simultaneously to that statement the defendant

Diane Ker walked from the kitchen into the living room. I identified myself to her, stated the same facts, then immediately walked to the kitchen without entering, standing in the doorway I observed a small scale on the top of the sink. The top of the scale was the brick-like, brick-shaped package containing the green leafy substance.

Q. This scale was on top of a sink.

A. That is correct.

Q. Were there any pots or pans or anything around it?

A. I believe there was a knife laying on the sink, other than that I don't recall.

Q. What about the paper and this green leafy substance?

A. It was in the same position it is now with a small rip in the package.

Q. And this scale, where was it in relationship to the sink itself?

A. It was on top of the sink at the—just west of the sink, approximately at a foot of it would be in the middle of the sink.

Q. Continue.

A. I then called or beckoned both defendants and Sergeant Warthen into the kitchen. They came over. I pointed to the package. I said, "What is this?" And the defendants answered they did not know. I said, "It appears to be marijuana to me. Is it yours?" And there were no comments made by the defendants.

Q. What do you mean, "no comments"? Did they say anything at all?

A. There was no answer to my question.

Q. You said, "Is it yours"?

A. That is correct.

Q. And nothing was said at all?

A. No answer came from either defendant.

Q. Then what happened?

A. I then advised the defendants that they were under arrest for suspicion of violating the State Narcotics Law.

It would be hard to conceive of testimony more demonstrative of the purpose of the illegal entry. It was obviously made in hopes of finding contraband for which the defendants could then be arrested. Had they not found the contraband, for what charge could they possibly have hoped to arrest the Petitioners pursuant to the information then possessed? What type of a narcotics investigation could the officers have in mind other than to search? Any other explanation is incomprehensible in view of the circumstances surrounding the entry into the apartment. There was not sufficient probable cause to arrest unless the arrest could be justified by the results of the search and the search in turn justified as incidental to the arrest. This "boot strap" argument has been criticized in *United States* v. *Lefkowitz*, 285 U.S. 452, and in *Johnson* v. *United States*, 333 U.S. 10, 16-17:

> "Thus the government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

CONCLUSION

Upon the foregoing, Petitioners urge this Court to hold that the entry into their apartment and subsequent search and seizure of the evidence upon which they were convicted was unlawful and the evidence inadmissible. The final test of whether under the Fourth and Fourteenth Amendments to the United States Constitution a search and seizure is unreasonable is one for decision by this Court rather than State Courts. The minimum standards should not be less than those now demanded by this Court in federal proceedings and which have been demanded of federal agents for almost fifty years.

The search cannot be justified as incidental to an arrest since there was not sufficient probable cause to make an arrest and the facts clearly indicate that the entry was not made for the purpose of arrest and the arrest cannot be justified other than by what it produced.

Respectfully submitted,

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